TESTIMONY
OF
SANTA YNEZ VALLEY CONCERNED CITIZENS,
PRESERVATION OF LOS OLIVOS,
AND PRESERVATION OF SANTA YNEZ
ON BUREAU OF INDIAN AFFAIRS
TRUST LAND ACQUISITION PROCESS

BEFORE THE

SENATE COMMITTEE ON INDIAN AFFAIRS

Mr. Chairman and members of the Committee, thank you for the opportunity to submit this testimony on the important subject of the legal requirements and procedures for decisions by the Bureau of Indian Affairs (BIA) on taking land into trust for Indian tribes. This is an issue that has generated considerable controversy throughout the nation for many years, and it recently has become a significant issue in our local area. The problems with the trust land acquisition process are being brought home to the Santa Ynez Valley as a result of the actions of the Santa Ynez Band of Chumash Indians. As discussed in our testimony, the problems we are currently confronting in the Valley are the direct outgrowth of the lack of adequate legal controls over the procedures used to consider trust land acquisition requests and the criteria that govern BIA decisions. We are grateful for this Committee's timely consideration of the trust land acquisition issue, and we pledge our support and cooperation to your efforts to bring reform to the tribal trust land process.

Background

The three organizations submitting this testimony, Santa Ynez Valley Concerned Citizens, Preservation of Los Olivos, and Preservation of Santa Ynez, have been established in recent years in response to concerns regarding the manner in which Tribal activities could affect the environment and quality-of-life in the Santa Ynez Valley. In 2004, our organizations became focused on the way that the Tribe was seeking to use the trust land acquisition process to develop land in Santa Ynez Valley in contravention of the local land use plans. Our organizations are comprised of residents, businesses and environmental interests united in the goal to protect the Santa Ynez Valley from unfettered tribal development.

The Tribe has already engaged in considerable development activity in Santa Ynez Valley. It currently possesses approximately 111 acres of designated reservation land on which is constructed a highly successful 190,000 square-foot

casino. The casino houses 2,000 slot and video machines, 40 table games, 14 poker rooms, a bingo room seating 1,000 patrons, four restaurants, and a gift shop. In 2002, the Chumash Indians financed a $150 million expansion of its casino and hotel, which was completed a year ago and is open for operation. The Tribe also operates an oversized, expandable wastewater treatment plant capable of handling significant additional development.

As the Tribe itself has acknowledged, in the very short period of time the Chumash Casino has been open, it has become economically self-sufficient. In fact, each tribal member reportedly receives $360,000 annually from casino revenues. The Tribe has been able to use casino revenues to support the Chumash Tribal government, an education program paying for a portion of members' education beyond high school, a health clinic, and numerous other tribal purposes.

Despite this high degree of success, the Tribe continues to request to have more land placed in trust for development. In January of this year, BIA announced its intent to accept 6.9 acres of land in trust. This land is located outside of the reservation boundaries, and it is supposed to be used for a commercial retail facility, parking lot, offices, and museum/cultural center. Our organizations decided to appeal the BIA decision because of numerous factors, including the other development plans which the Tribe appears to be submitting to the BIA in a piecemeal manner. The BIA ignored the concerns expressed by our organizations and others regarding the Tribe's plans for development, including our request that the BIA facilitate the development of a cooperative agreement between the County and the Tribe to protect local interests.

Within a few months of the BIA's decision on the 6.9-acre parcel, the Tribe filed another request to have an additional 5.8-acre parcel of land placed in trust immediately adjacent to the 6.9-acre parcel. The reason for this trust acquisition is not clear, since the Tribe indicated on its application that it does not intend to change the use of the land in any way. A look at a map suggests that the Tribe is attempting to connect all of these and possibly other parcels to establish a contiguous stretch of trust land free from local control. It also may be trying to connect its current reservation to a large tract of property it seeks to develop with a local landowner, Mr. Fess Parker.

Over the last year, the Tribe has engaged in negotiations with Mr. Parker to acquire an additional 745-acre parcel located about 1.5 miles from the 6.9-acre parcel and almost 2 miles from the Tribe's reservation. In those negotiations, the Tribe planned to develop this large, and exceptionally beautiful, tract of land cooperatively with its current owner, Mr. Parker, as a luxury housing development, two golf courses, and other commercial development. Mr. Parker proposed the plan to the Tribe because he had for years been unable to develop the land commercially himself due to existing and accepted County land use restrictions. By having the land placed in trust, Mr. Parker and the Tribe can evade local land use restrictions,

which currently designate the land for rural uses only. In addition, there also may have been a plan under consideration to build a casino on this property. If that is the case, having the land connect to its reservation could possibly allow the Tribe to evade other review requirements under the Indian Gaming Regulatory Act (IGRA). The current status of their plans for the Parker parcel is unclear.

Regardless of whether the Tribe intends to develop another casino on Mr. Parker's land, its efforts to acquire additional land in trust are undermining the land use plans in the Valley and will adversely impact the environment and quality of life in the region. We do not believe that Congress ever intended for the trust land process to become an evasion of community land use or environmental rules that would otherwise be applicable. In particular, we are concerned with the Tribe's apparent desire to add parcels together that it argues are "contiguous" to each other to gain the benefit of more permissive BIA trust acquisition standards for such properties. Rather than reveal its overall plans, the Tribe appears to be following a pattern of simply adding one parcel to another, piece-by-piece, in a gradual effort to expand its trust lands without ever undergoing full disclosure or review. Further, the Chumash request to have land placed in trust for no apparent reason would establish dangerous precedent to allow a successful tribe to take advantage of a process intended to help economically disadvantaged tribes attain self-sufficiency and effective self-governance.

Problems with Trust Land Process

The factual situation described above demonstrates the problems with the BIA's approach to trust land acquisition. The procedures and standards for making decisions on trust land requests are weak and ineffective, and they do not provide an adequate role for public participation. The combined effect of these deficiencies is to make it possible for tribes to have land removed from state and local control and taxation to the detriment of local communities without adequate justification or public interest review. Each of the principal problems with the trust land process is discussed below.

Need for Clear Standards. The current BIA trust land acquisition regulations are set forth in 25 C.F.R. Part 151. These standards predate the Indian gaming era that came into effect in 1988 with the enactment of the Indian Gaming Regulatory Act (IGRA). With the establishment of Indian casinos and the generation of incredible wealth for some Indian tribes, the potential for abuse of the trust land process has grown significantly. When the regulations were first promulgated, it was generally the case that tribes would seek to have land taken into trust for the purpose envisioned under section 5 of the Indian Reorganization Act of 1934 (IRA), where the statutory authority comes from. These were circumstances where additional land was truly needed by a tribe to achieve governmental and economic self-sufficiency. The regulations appear to have been generally adequate for evaluating most trust land requests in that context. Indian gaming has changed all

that, however, because not only do many tribes now have the financial wherewithal to buy virtually any land in any place for any purpose, there is strong incentive to add to the wealth generated by Indian casinos by taking more land into trust, escaping the requirements of local land use planning which may prohibit casino-related development, and avoiding the need to pay any taxes or other government fees on the use of that land. This is a virtual bonanza for casino interests and developers. The problems presented by a procedure that allows sovereign tribal governments and their developer partners to escape all state and local regulation become even more apparent when real world situations are considered, as demonstrated by the situation we now confront in the Santa Ynez Valley.

The problem with the current regulations is that they are far too general and vague. There are seven criteria under the BIA regulations in 25 C.F.R. Part 151 for taking land into trust, and only three of these -- purpose of trust land request, tribal need for putting land into the status, and impact on local governments -- are of any real significance. Unfortunately, the regulations do not spell out in any way what these standards mean, and the BIA has developed no useful guidance over the years on how to apply them.

It has been over 70 years since Congress addressed the circumstances under which land should be taken into trust as a general proposition through the IRA. It is now time to revisit that question by providing specific standards as to the acceptable purposes for taking land into trust, the circumstances under which tribal need can be demonstrated, and how the concerns of local governments, and the represented public, would be taken into account.

In this regard, we believe it is particularly important to return to the basic purposes of land in trust. The purpose of the IRA was "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." H.R.Rep. No. 1804, 73rd Cong. 2d Sess., 1 (1934). The Act encouraged "tribes to revitalize their self-government through the adoption of constitutions and bylaws and through the creation of chartered corporations, with power to conduct the business and economic affairs of the tribe" so that "a tribe taking advantage of the Act might generate substantial revenues for the education and the social and economic welfare of its people." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).

These principles should continue to apply. In circumstances such as those we are confronting in the Santa Ynez Valley, wealthy tribes that have achieved an extraordinary level of success and economic self-sufficiency should not be able to apply to have land taken into trust for vague and generalized purposes such as self-determination and consolidation of land holdings. At the very least, when such circumstances exist, federal law should prohibit land from going into trust unless the tribe involved has entered into an intergovernmental agreement with the affected local government that provides for consistency with local standards and ensures that

compensation is provided to cover the impacts associated with the development that is likely to occur on such lands. Most importantly, such agreements must be required to include a waiver of sovereign immunity and an agreement on judicial enforcement. They also should be subjected to public review. Unless standards such as this are developed, there will be no limit on placing land into trust; tribes will always be able to meet the test, and local community interests will be lost.

Limitation on Development to Proposed Uses. Another major problem with the trust land acquisition process is that it does not impose limitations on the use that can be made of such land once it is taken into trust. As a result, there is strong concern that tribes will identify one purpose, or claim only a very general intent for the use of such land, until the trust land decision is made. Then, once the land is in trust, the tribe will change its use to something entirely different that is objectionable to the local community, violates local standards, and should have been the subject of far more detailed federal environmental review.

The federal government takes the position that it cannot impose deed restrictions on land titles held by the United States. While we do not necessarily agree with this concern, such a problem can be readily addressed by Congress in the context of trust land acquisition. We believe it is critically important that tribes be held to their intended uses of the land that serve as the basis for BIA and public review.

Improved Public Review. The current trust land process does not provide for adequate public review. As demonstrated by the strong public controversy over many trust land requests, the effect of such action by the BIA has a very strong impact on local communities. Yet, BIA regulations have no provision that provides for public comment, they only provide for local governments with jurisdiction over the subject lands to submit information on tax loss and jurisdictional conflicts. The only way public comment occurs is through related legal requirements, such as the National Environmental Policy Act (NEPA). When tribes develop proposals that are not addressed through a NEPA process involving public comment, such as an EIS, then there is no opportunity for such input at all.

We currently are confronting such a situation in the Santa Ynez Valley, where the Chumash Band is seeking to have the 5.8-acre parcel taken into trust on the theory that there will be no change in land use. Obviously, a parcel of land in this location, in a prime commercial location, will not go undeveloped. Yet, by arguing for no change in use the Tribe could make an effort to avoid NEPA review entailing public comment. The California Environmental Quality Act does not apply because there is no state action. Obviously, any federal decision-making process is improved by public input, especially one that has such a significant impact on local communities. The BIA trust acquisition process must be reformed to provide expressly for such public comment.

BIA Trust Land Checklist. The practice of BIA to avoid public review is amply illustrated by the recently released "Trust Land Acquisition Checklist." This checklist contains numerous provisions that are of concern to the public. It is focused primarily on trust land acquisitions in the gaming context, and includes things such as geographic limitations on the applicability of the critically important section 20 of IGRA, which prohibits gaming on post-1988 trust land except in narrow circumstances. The Checklist also covers issues such as procedural limitations on how consultation under section 20 would occur, definitions of what constitutes gaming on contiguous lands, and other very important provisions. Many of these provisions are of considerable concern to us, yet BIA unilaterally issued this checklist as internal guidance to govern its actions and public involvement in trust land reviews without even seeking outside comment. Indeed, many of these provisions were included in proposed regulations issued in the past. This demonstrates that the provisions of a checklist qualify as rulemaking, yet the BIA has simply forged ahead in issuing this guidance on trust land issues of great importance to the public without any notice or comment.

The Need for Intergovernmental Agreements. Experience has demonstrated that many of the concerns associated with trust land acquisition can be addressed through the development of intergovernmental agreements between tribes and local communities. There is a strong record in this regard, and the possibility of such an agreement being developed in the Santa Ynez Valley for the 6.9-acre parcel is now under consideration. Our organizations strongly support the use of such agreements, provided they are developed with adequate public input, fully address local concerns, and are made enforceable in the appropriate court through waivers of sovereign immunity. We understand that the BIA generally supports the use of this approach, but far more needs to be done to develop these agreements and support their use. The BIA should be playing a more active role and encouraging parties to trust land disputes to pursue such agreement, and it should be developing prototype agreements that contain the provisions which are typically necessary for things such as sovereign immunity waivers. Successful use of intergovernmental agreements can help avoid trust land conflicts, and BIA should play a leading role in promoting their use.

Conclusion

It is clear that the trust land acquisition process is broken. The situation that is now emerging in the Santa Ynez Valley is a perfect example of this problem. Unfortunately, we do not believe that the BIA is doing enough to solve these problem areas. We encourage the Committee to become actively involved in this issue and to use circumstances such as those occurring in the Santa Ynez Valley as the basis for oversight and reform. Thank you for considering these comments, and please let our organizations know what they can do to assist in your review and reform efforts.